No. 16169

United States Court of Appeals
For the Ninth Circuit

MOORE-MCCORMACK LINES, INC., a Delaware corporation, *Appellant,*

vs.

LOUIS RUSSAK, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S BRIEF

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INDEX

TABLE OF CASES

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JURISDICTION

This involves a passenger's personal injury action against a steamship company.

On October 3, 1957, Louis Russak commenced suit against Moore-McCormack Lines, Inc., a Delaware corporation, in the Superior Court of the State of Washington in and for the County of King, claiming damages for $10,000.00 as a result of injuries received while a passenger aboard the S.S. "ARGENTINA" (Complaint, Tr. 6). On October 22, 1957, within twenty days after service of the complaint, the suit was removed to the United States District Court for the Western District of Washington on the ground of diversity of citizenship in a matter exceeding $3,000.00, exclusive of interest and costs (Petition for Removal, Tr. 3). The District Court had jurisdiction of the suit by virtue of the removal proceedings. 28 U.S.C. Sections 1332, 1441, 1446.

By stipulation of counsel, jury trial was waived and the action was tried by the court (Tr. 24). On July 2, 1958, the District Court entered Findings of Fact and Conclusions of Law and Judgment for the plaintiff of $3,500.00 and costs (Findings, Conclusions, Judgment, Tr. 10-14). On July 29, 1958, within thirty days of the entry of Judgment, defendant filed its Notice of Appeal to this court and Bond on Appeal and Supersedeas Bond (Notice, Bond, Tr. 15-16). This court has jurisdiction of the appeal. 28 U.S.C. Sections 1291; 2107.

STATEMENT OF THE CASE

This suit involves an injury to a passenger—Louis Russak—occurring during a ship party aboard the passenger vessel "ARGENTINA," owned and operated by Moore-McCormack Lines, Inc. Mr. and Mrs. Russak were first-class passengers on a cruise from New York to Buenos Aires (Tr. 25). Russak slipped while dancing and injured his left foot. He and his wife were participating in an impersonation contest as colored dancers held for the passengers at a ship party (Tr. 36-40).

Ship Party

On March 22, 1957, Mr. and Mrs. Russak attended a ship party given in the main lounge. It was described as a "costume party," "a gala evening" and one of the bigger nights of entertainment during the cruise, which "probably ranked second to the Captain's farewell dinner which is held the night before Rio" (Tr. 26, 57).

The party occurred after dinner, sometime between 8 or 9 P.M. and 10 P.M., according to appellee (Tr. 35-36), and between 9:15 P.M. and 11 P.M. according to appellant's witness Dr. Robert B. Kayser (Tr. 58).

Appellee estimated the number of persons present in the lounge at "possibly several hundred" (Tr. 42). Most of a full complement of first-class passengers were present in the lounge (Tr. 70). There were children present in the lounge and on the dance floor (Tr. 38, 48). Ship's personnel present at the party included Dr. Kayser, ship's surgeon, a lounge steward, the cruise directress and possibly another lounge steward, as well as some of the executive officers (Tr. 58).

Passenger Impersonation Contest

It is not clear how many passengers participated in the contest or the exact nature of the contest. It was held before judges (Tr. 39). One of the passengers participated in the contest dressed in a South American costume imitating the late Carmen Miranda (Tr. 27). Appellee and his wife performed with other couples, variously described as "between ten and fifteen or twenty couples" (Tr. 28), "probably ten or twenty couples altogether" (Tr. 37), "think we were seventeen couples" (Tr. 42). The couples danced "one or two at a time" (Tr. 42) and appellee could not remember how many were dancing at the time he and his wife were (Tr. 43).

The couples participating in the contest were made up for their parts in a room immediately adjacent to the lounge and the dance floor (Tr. 26). The door to this room was open and the contestants waiting to perform could see part of the dance floor (Tr. 27). The adjoining room was approximately five or six feet from the dance floor and the passengers watching the contest were on the other side of the dance floor and nobody was sitting in the entrance leading on to the dance floor (Tr. 37).

Appellee and his wife remained in the adjoining room until they came on to the dance floor to participate in the contest (Tr. 37).

There were passengers sitting in the lounge chairs around the dance floor and others standing, all watching the contest (Tr. 27, 37). The persons watching included children (Tr. 38). Appellee also testified that there were children as well as adults on the dance floor (Tr. 48).

Dance Performed by Appellee in the Contest

Appellee and his wife participated in the contest as colored dancers and had their faces blacked as part of their make-up (Tr. 36-37). The description of the dance performed is not clear. Appellee called it "a Russian dance," and further described it as follows: "mixed up, when you have lots of fun, music playing, and you dance part maybe a little Russian or a little waltz or anything almost. There is no certain steps that you dance most of the time. You dance whatever you feel like" (Tr. 39). The dance was being performed by appellee in the middle of the dance floor (Tr. 41). The approximate size of the dance floor was twenty-five by thirty-five (presumably feet although not stated in the record) and all of the dancing performed by appellee and his wife was in one area, probably six or seven feet in all (Tr. 42, 44).

Testimony Concerning Slip During Appellee's Dance

The only evidence concerning the occurrence was given by appellee and his wife. Appellee testified as follows: "* * * I started dancing with my wife and my foot slipped, and I felt a sharp pain and I didn't want to fall

down on the floor, but I could see right next to my foot there was a little bit of moisture. It looked like a few grapes, skin of a grape." In describing the area, Mr. Russak testified: "It wasn't very big. Maybe five or six inches" (Tr. 28). Appellee admitted that it was a very little slip (Tr. 45). He thought they were doing a dance "like the Russian dance" at the time of the incident but admitted it was hard to tell. Appellee admitted that he was doing his best to be selected as the best contestant (Tr. 40).

Appellee's wife described the incident as follows: "I was dancing around him and I noticed he couldn't move his foot, he slipped" (Tr. 54).

The only other witness to the facts was called by the appellant—Dr. Kayser—and he was present throughout the contest, observing and taking pictures of the contestants ((Tr. 63). He did not observe any accident or injury occurring during the evening and was in a position throughout the evening to have observed had a contestant slipped and fallen (Tr. 58, 66).

Condition of Dance Floor

Appellee did not remember whether there was powder or anything on the floor to make it easier to dance. He explained that he was not in the room at the time and did not see what had been done. He had no difficulty in moving his feet over the floor and described it as like regular dancing (Tr. 50).

At the time of the incident, appellee was not looking at his feet or his wife's feet or at the floor, but was looking straight ahead (Tr. 41). He did not observe anything

on the dance floor before he came out to participate in the contest. It occurred in the middle of the dance floor (Tr. 41). After the incident, he spent "very little" time looking at the area where it occurred (Tr. 49), and did he go back at any time afterward to look at the area (Tr. 51). Appellee's wife did not see anything on the floor (Tr. 55). Dr. Kayser did not see any substances such as grapes or anything else on the floor and did not recall the progress of the evening's contest being stopped at any time for purposes of a clean-up (Tr. 65).

The only testimony in the record concerning the alleged condition on the floor was given by appellee. He testified as follows: "* * * * there was a little bit of moisture. It looked like a few grapes, skin of a grape. * * * It wasn't very big. I would say maybe five or six inches" (Tr. 28).

He testified that he reported the incident to the ship's doctor and stated as follows to the doctor: "* * * I told him it was wet in there, it was moisture looked something like grapes, * * *" (Tr. 30).

In describing what he saw, appellee testified: "It was something like grey colored, grey or brown that kind of color it was." It was a "mixed" color (Tr. 49). He observed no other substance anywhere else on the dance floor (Tr. 49-50).

Lack of Knowledge or Notice by Appellant—Actual or Constructive

There is no evidence in the record that the appellant had actual knowledge of the condition described by appellee. Neither appellee or anyone else saw anything drop on the dance floor (Tr. 49).

According to testimony by appellee and his wife, ear-

lier in the contest there was the passenger-contestant who imitated Carmen Miranda. She was described as a lady from Brazil and had a basket with all kinds of fruit. As a part of her performance "she was giving some of the fruit to the passengers, throwing it. The passengers seated around the dance floor were asking for the fruit" (Tr. 27).

Appellee testified as follows concerning the contestant "Carmen Miranda" passing out the fruit:

"Q. At the time that you observed the fruit being passed out was it being passed out off the dance floor?

A. Yes.

Q. To people standing outside the dance floor?

A. Yes. She was going around.

Q. She walked all the way around the dance floor?

A. Yes.

Q. Did you observe her dropping anything?

A. Well I couldn't say. (Remainder of this answer was stricken by the court as not responsive to the question.)

Q. Did you see any fruit drop on the floor?

A. I didn't at that time when I was standing there.

Q. Did you at any other time?

A. The only time I saw it—No I didn't except after the accident happened" (Tr. 37-38).

Appellee testified further:

"THE COURT: Did you see yourself anything drop at that place?

THE WITNESS: Before we came out?

THE COURT: Before you came out.

THE WITNESS: No I didn't" (Tr. 49).

Appellee's wife testified:

"Carmen Miranda, she was throwing grapes in the corners for the people to catch." (Remainder of the answer was based upon speculation and stricken by the Court) (Tr. 52)

Appellee testified that he and his wife followed "Carmen Miranda" as a contestant by "about twenty or twenty-five minutes, something like that" (Tr. 27). His wife testified that the time elapse was "about fifteen or twenty minutes after a few other couples went on" (Tr. 53).

Dr. Kayser did not notice any substance on the floor at any time during the progress of the contest (Tr. 65).

No evidence was introduced in the record as to how the condition described by appellant came to be on the dance floor or how long it had been there prior to him slipping.

Ship's Clean-up Procedure

Dr. Kayser testified that the duties performed by the lounge steward during the party included taking care of the maintenance of the lounge. With respect to cleaning up substances, if any, spilled on the dance floor, Dr. Kayser testified that it was cleaned up immediately by the lounge stewards, who are on the job while the passengers are in the main lounge (Tr. 62, 63). This was the general practice aboard the vessel (Tr. 64, 65). The lounge steward was in attendance at all times through the party on March 22, 1957 (Tr. 63).

COURT'S FINDINGS

From the foregoing evidence, the court found, *inter alia,* as follows:

> 1. " * * * said defendant * * * permitted the floor of the main lounge of that vessel to have and remain thereon spilled fruit and residue of fruit after a reasonable opportunity to remove the same." (Tr. 11, Finding II);
>
> 2. "That as a direct and proximate result of the negligence of the defendant as aforesaid,* * * plaintiff slipped and fell violently to the floor." (Tr. 11, Finding II)

It will be observed that the Findings of Fact above are identical with the allegations of negligence contained in paragraph II of the Complaint (Tr. 6, 7, 11).

SPECIFICATION OF ERRORS

1. The District Court erred in making the finding that appellant was negligent (Tr. 11, Finding II), since there was no evidence that the alleged "spilled fruit and residue of fruit" was in fact fruit, or that it was slippery, or how and when it came to be in the middle of the dance floor, or that appellant had either actual knowledge or constructive notice of the alleged condition prior to the injury; that said finding is clearly erroneous and should be reversed.

2. The District Court erred in making the finding (Tr. 11, Finding II) that "plaintiff slipped and fell violently to the floor" as a "proximate result" of the alleged "spilled fruit and residue of fruit" since there was no evidence to support said finding, and it is clearly erroneous and should be reversed.

3. The District Court erred in admitting testimony by appellee, over appellant's motion to strike as "hearsay," concerning statements made by the cruise director after the injury as follows: " * * * they will see it will never happen again" (Tr. 29).

4. The District Court erred in admitting testimony by appellee's wife concerning statements by the cruise director to the same effect as follows: "I will see this will never happen again. We won't allow any more dances with Carmen Miranda throwing grapes" (Tr. 55, 56).

ARGUMENT

Summary

1. To find appellant negligent for a foreign substance—"spilled fruit and residue of fruit"—on the dance floor, there must be evidence that appellant had actual knowledge or constructive notice of the foreign substance on the dance floor and a reasonable opportunity to correct it. *Demgard v. United States* (S.D. N.Y.) 94 F.Supp. 309.

2. Appellant had no actual knowledge of any foreign substance on the dance floor. Therefore, appellee had the burden of proving constructive notice.

Appellee was the *only* person to testify about a foreign substance and he described it as a "*little bit of moisture*"; "It *looked like* a few grapes, skin of a grape"; and maybe "*five or six inches*" in size (Tr. 28). Appellee testified that he slipped *in the middle of the dance floor* (Tr. 41) .*No other substance was observed anywhere else on the floor* (Tr. 49, 50). Therefore, appellee had the burden of proving that the condition which he described had been present *in the middle of the dance floor* for a *period of time*

long enough to charge appellant with constructive notice of its presence there.

Appellee cannot sustain the burden of proof as to the *time period* that the condition he described was present *in the middle of the dance floor* by evidence that another passenger — at an earlier time — was going *around the dance floor* passing or throwing fruit or grapes *off the dance floor* to passengers seated and standing *off the dance floor, particularly where no one saw any fruit spill or drop on the dance floor or anywhere else.*

To hold that a *time period* for charging appellant with *constructive notice* of this foreign substance *in the middle of the dance floor* had been established by such evidence *is to indulge in speculation and conjecture and to build inferences upon an inference.*

It is error to speculate and build inferences upon an inference to establish a *time period* for constructive notice. *Old South Lines v. McCuiston*, 5 Cir., 92 F.2d 439, 441. There is not a scintilla of evidence to support a finding of constructive notice. The scintilla of evidence rule is followed by this court. *Hawley v. Alaska Steamship Company*, 9 Cir. 236 F.2d 307, 309.

3. Rule 52(a) of the Federal Rules of Civil Procedure providing that findings of fact of a trial court will not be set aside unless "clearly erroneous" does not apply to inferences to be drawn from the evidence; this can be done as easily by the appellate court as by the trial court. *Kuhn v. Princess Lida of Thurn & Taxis*, 3 Cir., 119 F.2d 704, cited with approval in *Western Union Telegraph Co. v. Bromberg*, 9 Cir., 143 F.2d 288; *Sears, Roebuck & Co. v. Johnson*, 3 Cir., 219 F.2d 590.

4. Even assuming a *time period* could be established by speculation and building inference upon inference,

the time period indicated by appellee of "*about twenty or twenty-five minutes*" (Tr. 27) or by his wife of "*about fifteen or twenty minutes*" (Tr. 53) was insufficient to charge appellant with constructive notice *considering appellee's testimony as to the nature, size, and description of the foreign substance.*

The finding by the District Court of negligence based upon constructive notice was unsupported by the evidence and was clearly erroneous and should be reversed.

5. **There was no evidence that appellee *actually slipped* on the foreign substance he described or that he *fell* to the floor, to support the finding that appellee "*slipped* and fell violently to the floor" as a *proximate result* of the condition described. This finding was clearly erroneous and should be reversed.**

6. **Testimony by appellee and his wife concerning statements by the cruise director were inadmissible as hearsay. *Naylor v. Isthmian S.S. Co.*, 2 Cir., 187 F.2d 538. Although immaterial to the findings of negligence and proximate cause, appealed from herein, the admission of the hearsay statements of the cruise director were prejudicial to appellant in that the court was given an improper impression by these statements.**

Shipowner Not Liable for Foreign Substance on Dance Floor Without Actual Knowledge or Constructive Notice.

Liability, if any, in this suit is based upon negligence. *Kitsap County Transp. Co. v. Harvey,* 9 Cir., 15 F.2d 166; *Moore v. American Scantic Line,* 2 Cir., 121 F.2d 767; *Aquino v. Alaska Steamship Co.,* Wash. 91 P.2d 1014.

A shipowner is negligent with respect to temporary conditions—such as foreign substances on the deck—

only if: (1) it has actual knowledge of the foreign substance or (2) the foreign substance has been present on the deck for a sufficient length of time to charge the shipowner with "constructive notice" *and* (3) it had a reasonable opportunity to clean it up, but failed to do so. *Demgard v. United States* (S.D. N.Y.) 94 F.Supp. 309 (oil or water on deck); *Dann v. Compagnie Generale Transatlantique* (E.D. N.Y.) 45 F.Supp. 225 (raised or puffed area of linoleum on deck); *Weill v. Compagnie Generale Transatlantique*, 2 Cir., 113 F.2d 720 (bulge in tarpaulin on deck).

In *the Demgard* case, *supra,* a passenger was injured when she slipped on a foreign substance on deck. There was some question whether the substance was oil or water. The court stated as follows on page 310:

> "It is conceded that it has not been established when the oily substance, or water, as the case may be, was placed upon the deck where the accident occurred, how long it had been there, or that any notice of the condition was ever given to any of the ship's officers or crew.
>
> "(1) We are dealing, therefore, with a situation where an accident did occur due to some foreign substance on the deck without the other elements required to spell out negligence on the part of the ship's owners. *The length of time that the foreign substance was permitted to remain upon the deck is in a complete state of uncertainty. Nothing has been shown to indicate the slightest opportunity on the part of the ship to remove or correct the alleged act of negligence.* I cannot find from these facts, therefore, that the respondent ever had actual or imputed knowledge of the condition." (Emphasis supplied)

In holding that libelant failed to prove that the respondent was negligent, the court found, *inter alia,* as follows on page 311:

> "6. There is no proof what said foreign substance on the deck was, except the testimony of libelant, who stated on one occasion it was water (and that she supposed it came from the ocean), and on another, oil.
>
> "7. There is no proof how long any foreign substance was on the deck when libelant fell, what such foreign substance was, or who put it there, or how it got there.
>
> "8. There is no proof that the foreign substance on which libelant claims to have slipped was on the deck long enough to have constituted constructive notice to the respondent of such condition.
>
> "9. There is no proof of actual notice of the conditions complained of by libelant."

The question of a "temporary foreign substance" on deck has arisen more frequently in seaman's suits against the shipowner than in passenger cases. In a seaman's suit based upon a theory of negligence (leaving aside any discussion of "transitory unseaworthiness" since the warranty of seaworthiness does not extend to passengers) no liability exists unless the shipowner has actual knowledge or constructive notice of the temporary foreign substance with a reasonable opportunity to correct it. *Poignant v. United States,* 2 Cir., 225 F.2d 595, 596 (apple peel on deck). *Shannon v. Union Barge Line Corporation,* 3 Cir., 194 F.2d 584 (oil spot on deck). *Cookingham v. United States,* 3 Cir., 184 F.2d 213 (Jello on deck).

In the *Poignant* case, *supra,* the court stated as follows:

> "The trial court found that the *defendant had no notice, actual or constructive, of the presence of the apple skin in the passageway and held that this lapse in libelant's proof was fatal to her cause of action for negligence.* The finding was consistent with the evidence in the case. We think that the trial court rightly ruled that libelant was not entitled under the Jones Act to recover on the grounds of negligence." (Emphasis supplied)

The same rule applies in connection with the liability of the operator of a dance hall for injuries occurring on the dance floor.

In *Hendrickson v. Brill,* Wash., 278 P.2d 315, the court stated the rule as follows:

> "The operator of a dance hall is not an insurer of the safety of his patrons, but is under the duty of keeping his premises in a reasonably safe condition. *To recover in the instant case, the plaintiff's evidence must show that the condition complained of was known to the operators of the dance hall, or had existed for such time as would have afforded the operators a sufficient opportunity, in the exercise of reasonable care, to have become cognizant of and to have removed the danger. Mathis v. H. S. Kress Co.,* 38 Wn.2d 845, 232 P.2d 921; *Smith v. Manning's, Inc.,* 13 Wn.2d 573, 126 P.2d 44." (Emphasis supplied)

In the *Hendrickson* case there was an action for personal injuries against the operators of the dance hall arising out of the fall on the dance floor when the plaintiff slipped or stumbled because of some "liquid or

sticky substance allegedly spilled and allowed by the operators to remain on the dance floor."

Plaintiff and two of his witnesses testified that they saw no foreign substance on the dance floor until after the accident occurred. Plaintiff offered no evidence that any employee of the dance hall knew of the existence of a foreign substance on the floor.

The jury returned a verdict for the plaintiff and the trial judge granted a motion for judgment n.o.v. This was affirmed on appeal, since the appellate court was convinced that it left *in the realm of speculation the answer to the question of how long the alleged foreign substance remained on dance floor prior to the fall.* In considering the evidence the court stated as follows with respect to *constructive notice*:

> "This case involves constructive notice and turns on the question of whether the plaintiff's evidence, and all reasonable inferences therefrom construed most favorably to him, showed that some foreign substance was on the dance floor for a sufficient time to constitute constructive notice.
>
> "Plaintiff testified that after the accident he saw something on the floor but did not touch or place his hand upon it. His testimony was not entirely clear as to whether the substance was water or a spilled drink of some kind. *From his testimony, it is not clear as to whether the spot where he slipped or stumbled was sticky, wet or merely moist. His dancing partner testified*:
>
> *" 'I can't say my dress was very wet. It was just dirty and gummy on the back from where people had been going through the spot.'*
>
> "In essence, the foregoing indicates the testi-

mony of the plaintiff relative to the foreign substance allegedly on the dance floor and the time that it had been there before the fall." (Emphasis supplied)

The evidence in the instant case as to the substance is substantially similar, since the appellee testified that the alleged substance was a little bit of moisture, and then described it as appearing like a grape. From his testimony it is certainly no more clear as to what the substance was than in the *Hendrickson* case.

See also *Custer v. St. Clair Country Club, Ill.,* 110 N.E.2d 697; *Revis v. Orr,* N.C., 66 S.E.2d 652, 28 A.L.R.2d 609; for an annotation entitled "Liability of Dance Hall Proprietor or Operator for Injury to Patron," see 28 A.L.R.2d 612.

Court's Finding That Shipowner Negligent Clearly Erroneous—No Actual Knowledge or Constructive Notice.

There is no evidence in the entire record that any person other than appellee Louis Russak saw the foreign substance on the dance floor. Not even his wife could testify to it (Tr. 55). Appellee had no knowledge of the substance on the dance floor prior to slipping (Tr. 38, 49).

The only testimony offered by the appellee to establish *constructive notice* was testimony concerning another passenger who had participated in the contest before them as "Carmen Miranda." According to appellee she passed and threw fruit to passengers seated and standing around the dance floor. Appellee's wife mentioned only *grapes* which she testified were thrown by this contestant into the corners of the room. She pre-

ceded appellee and his wife in the contest by "about 15 or 20 minutes" (Tr. 53) or "about 20 or 25 minutes" (Tr. 27).

All of the fruit was passed *off the dance floor,* to the passengers (Tr. 37, 38). She walked *all the way around* the dance floor (Tr. 38). *No fruit or grapes were observed to drop on the dance floor* (Tr. 38). *The place where the slip occurred was in the middle of the dance floor* (Tr. 41).

The finding by the court that the vessel permitted spilled fruit and residue of fruit to remain on the dance floor after a reasonable opportunity to remove it is based upon sheer speculation and requires that inference be built upon inference in order to establish *any* time period for the purpose of claiming that the shipowner had *constructive notice.*

The building of inferences must necessarily proceed as follows:

1. That the substance was in fact fruit rather than moisture from another source; for instance, if it were water or moisture from anything other than fruit there would be nothing at all to indicate a time period. Appellee described it definitely as "a little bit of moisture" (Tr. 28, 30); his description of it as fruit was vague and indefinite—"it *looked like* a few grapes, the skin of a grape" (Tr. 28) (Emphasis supplied). Appellee saw it only for a very brief time described by him as "not very much, very little" (Tr. 49); he did not look at the area again (Tr. 51); it was a very small area, "5 or 6 inches" (Tr. 28); the evidence does not support the conclusion that the substance was fruit.

(2) In order to establish a time period to charge constructive notice the trial judge was obliged to indulge in a second inference that the fruit was *spilled* by "Carmen Miranda" while she was walking *around* the dance floor passing or throwing fruit or grapes *off the dance floor* to passengers seated or standing *off the dance floor;* for instance, if anyone of the several hundred other persons present, including the children present, dropped, spilled or threw the fruit back on the dance floor after it was passed out, this might have occurred immediately prior to the slip.

(3) Since the spillage was described by appellee as existing *in the middle of the floor,* it must be inferred then that the alleged spillage was transported by some unknown agency from *off or around the edge of the dance floor* where *spilled* twelve feet or more to the middle of the dance floor where appellee claims his injury occurred.

(4) The court was obliged to make the further erroneous inference that if "Carmen Miranda" did spill fruit around the edge of the dance floor, that it was the same fruit that was crushed in the middle of the dance floor causing the "little bit of moisture" described by appellee.

(5) That upon this inference would be placed the inference that the shipowner had a reasonable opportunity at the time indicated to observe a condition of the size and description indicated "5 or 6 inches" in time to have corrected it during the contest.

Findings of fact cannot be based upon speculation and a series of inferences built upon inferences. The only

reference to a time period in the evidence relates to the activities of "Carmen Miranda" although there is *no* evidence that *any fruit spilled* during the course of her act.

An identical question was presented to the court in *Old South Lines, Inc. v. McCuiston,* 5 Cir., 92 F.2d 439 and 92 F.2d 441. This suit was tried by a jury in the District Court and judgment entered for the plaintiff. It was reversed on appeal. The suit involved personal injury sustained by a passenger on an interstate bus. The facts most favorable to the passenger indicated that she boarded the bus at Winston-Salem between 8 and 9 o'clock in the morning and thereafter at around 11 o'clock had occasion to leave the bus and then re-enter it. At the time of re-entering the bus she noticed an elderly gentleman sitting two or three seats from the front eating bananas. When the bus reached a stop at 8 o'clock that night she left the bus to go to the rest room. She walked back to the back of the bus to pick up a magazine lying on the last seat and when she turned around her foot hit the banana peel and she was caused physical injuries. She was the sole witness to what happened.

In holding that liability *in this case could only be based upon speculation and a succession of inferences on an inference,* the court stated as follows:

> "It is apparent that this case is controlled by *Windham v. Atlanta Coast Line R. Co., supra,* unless the mere fact of the man eating bananas near the front of the bus nine hours before the accident, coupled with the presence of a piece of banana peeling on the floor at the time of the injury, was

sufficient to warrant the inference that the peeling was thrown on the floor by the elderly gentleman and remained there until appellee slipped on it. Such an inference would be the result of mere speculation, and not a logical conclusion from any fact or facts in evidence. While the man was seen eating bananas, no one saw him throw the peeling on the floor or, in fact, saw the peeling. A fact once shown to exist is ordinarily presumed to continue until the contrary appears, but obviously this presumption has no application to the activity of a man eating bananas. *Liability cannot be imposed upon a carrier by a succession of inferences on an inference, as by inferring, first, that the banana was peeled in the bus; second, that the peeling was thrown on the floor third, that it was removed by some unknown agency to the rear of the coach; and, fourth, that it remained there until appellee stepped on it.* Much speculation might be indulged as to what the elderly gentleman did with the peeling of the banana he was eating, but one man's guess is as good as another's. Although the appellee did not testify that she saw it, we know that the banana once had a peeling; but there is no evidence as to when or where the peeling was removed or as to what became of it. Neither do we know that the elderly gentleman was the only person in the bus that ate a banana during the nine hours of that long trip." (Emphasis supplied)

In the companion case by the same name, appearing at 92 F.2d 441 (involving a suit by the husband for loss of services of his wife) the court made the following statement on page 441:

"The same evidence appears in the record of both cases, and, as we have just held that the evidence on

behalf of the wife was insufficient to warrant the court in submitting to the jury an issue of negligence on the part of the bus line, it necessarily follows that our ruling on this record is the same, *viz., that since no witness saw the banana peeling on the floor prior to the time the passenger stepped on it and was injured, and since the finding by the jury, that it had remained on the floor for such an unreasonable length of time as to impute negligence to the carrier, depended upon successive inferences drawn from an inference that another passenger had thrown it here, the verdict and judgment did not rest upon substantial evidence, either direct or circumstantial."* (Emphasis supplied)

We have an identical situation here. The testimony indicated only that "Carmen Miranda" was passing and throwing fruit out around the edge of the dance floor. No one observed her drop any fruit. There were several hundred other people in the main lounge off of the dance floor, many of whom received fruit. There were numerous children present. Any one of these persons might have dropped, spilled or thrown the fruit at any time right up until the time of the accident. The grape, if it was a grape, might have rolled from a table off the dance floor shortly prior to the incident. A grape might even have been thrown at the contestants in the spirit of the party by one of the children or the passengers having a good time. Even assuming that none of these possibilities occurred, and that Carmen Miranda "spilled" the fruit, the evidence indicates that this would be around the edge of the dance floor and there is a total absence of evidence to indicate how such fruit would have been moved to the position in the middle of

the dance floor. The dance floor has been described as twenty-five by thirty-five (presumably feet although not so stated in the record) (Tr. 42).

To conclude that the grape was spilled by "Carmen Miranda" during her act, and not dropped, thrown or moved by any other person at a later time to the middle of the dance floor is to indulge in speculation and the building of inferences upon an inference.

In *J. C. Penney Company v. Norris,* 5 Cir., 250 F.2d 385, 387, the court considered the building or piling of inferences on inferences in connection with the question of constructive notice. This involved a personal injury action tried to a jury arising out of a fall by a customer in a store. The jury returned a verdict for the plaintiff and defendant appealed attacking the sufficiency of the evidence to support the verdict. The evidence indicated that Mrs. Norris descended stairs to the curtain department in the basement and when she finished looking at the curtains, she ascended the stairs at the same place to the street level. She stepped on a bottle cap and fell down the stairs. Mrs. Norris and another witness called on her behalf were at the curtain counter in the basement between thirty and forty minutes before Mrs. Norris ascended the stairs. While they were in the basement no one else came down the stairs and they did not hear the bottle cap fall on the step.

The plaintiff had the burden of proving that the foreign substance had been on the floor for such a period of time that it should have been discovered and removed by the defendant, and sought to establish that the cap was on the stairs for the thirty to forty minutes that

Mrs. Norris was in the basement. The appellate court reversed the trial court and remanded with directions to enter judgment for the defendant, holding that it would be necessary to pile inference on inference to support a finding that the cap had been on the stairs for thirty to forty minutes. In describing the "chain of inferences" necessary the court stated as follows:

> *"For us to hold otherwise would amount to our saying the jury could base its finding of negligence on the following chain of inferences*: Mrs. Norris was close enough to the stairs to have heard the placing or dropping of the cap on the step if it had been done while she was in the basement. That regardless of whatever else she was doing she would have heard it if the cap had fallen there while she was in the basement; although she did not see the cap when she went down the steps at the same place and holding the guard rail, it must have been there 30 to 40 minutes; that since it was there at least 30 minutes a failure of the management to find and remove it within that time was negligence. *As to such a tenuous chain of reasoning to supply the proof of negligence we have said*:
>
> " 'The criticism in the field of logic, even though such criticism does not result in an absolute legal prohibition against piling inference on inference, stems from the very remoteness of the conclusion from the known facts.' *Smith v. General Motors Corp.*, 5 Cir., 227 F.2d 210, 216." (Emphasis supplied)

It is also improper and too speculative to attempt to fix a time period for purposes of constructive notice, by testimony showing a deteriorated condition of the foreign substance. In *Sattler v. Great Atlantic & Pacific*

Tea Company, W.D. La., 18 F.R.D. 277, the court discussed the matter as follows:

"Plaintiff insists that the condition of the object being 'withered,' as testified to by Mrs. Sattler, is probative evidence to establish or to reasonably infer that it had remained on the floor an unreasonable length of time. *To accept such as proof would be basing an inference upon an inference.* As pointed out by counsel for defendant, *such proof was expressly rejected by the Louisiana courts in the Powell case, supra,* with respect to the color of a banana, and in the*Boucher* case, *supra,* with respect to popcorn; *by the Eighth Circuit Court of Appeals in the Campbell case* with respect to the speculation required to determine how long tobacco juice had been on the floor by the fact that its outer rim or perimeter had dried; *by the Michigan and Connecticut courts* with respect to the appearance and condition of dry, dirty frankfurter skins and fatty meat. *Edwards v. F. W. Woolworth Co.,* 129 Conn. 245, 27 A.2d 163; *Evans v. S. S. Kresge Co.,* 290 Mich. 698, 288 N.W. 322, 291 N.W. 191. More to the point, however, is the decision of our own Fifth Circuit Court of Appeals in the comparatively recent case of *Stowe v. S. H. Kress & Co.,* Dec. 11, 1947, 164 F.2d 593, 594, where the court said:

" 'The fact that the banana peel was black is not indicative of the length of time that it was allowed to stay on the stairway. As stated by the court below: "In the first place there is nothing in the evidence here as to what caused it to turn black. That is all counsel's theory, without any evidence. You would have to take judicial notice that it stayed right there on the floor until it turned black; that it did not turn black from staying on the banana stalk too long".'

> "Believing as we do that there is no evidence in this record, which, if believed, would authorize a finding against the defendant, the motion for a directed verdict is sustained." (Emphasis supplied)

In *Campbell v. Schwers-Campbell, Inc.,* N.M., 285 P.2d 497, the court discussed the question of inferences supported only by surmise or conjecture and quoted from another decision, *Stambaugh v. Hayes,* N.M., 103 P.2d 645, as follows:

> "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved (*State v. Jones,* 39 N.M. 395, 48 P.2d 403) and guesswork is not a substitute therefor."
>
> *"Where evidence is equally consistent with two hypotheses, it tends to prove neither." P. F. Collier & Son v. Hartfeil,* 8 Cir., 72 F.2d 625. (Emphasis supplied)

Shipowner Not Negligent — No Evidence that Alleged Condition Was Slippery or Dangerous

There was no testimony in the record that the condition described by appellee was slippery or dangerous. The testimony concerned only the slip (Tr. 28, 45, 54).

The slip was a very little one (Tr. 45).

In *De Baca v. Kahn,* N.M., 161 P.2d 630, it was claimed by the plaintiff that she had slipped and fallen in defendant's store because the floor had been allowed to remain wet with oil rendering it slippery and dangerous to walk on. The jury rendered a judgment for the plaintiff and the defendant appealed. It was reversed on appeal and remanded with instructions that

judgment be entered for the appellant. In discussing whether the fact that the plaintiff had slipped would in and of itself establish a dangerous walking surface, the court stated as follows on page 635:

> "The fact that plaintiff slipped and fell on the floor does not, of itself, tend to prove that the surface over which she was walking was dangerously unfit for the purpose. *Knopp v. Kemp & Hebert,* 193 Wash. 160, 74 P.2d 924; *Rothschild v. Fourth and Market Street Realty Co.,* 139 Cal. App. 625, 34 P.2d 724."

It would seem to be a matter of common knowledge that a floor would be slippery for the purpose of dancing. The fact that a person slipped on a dance floor is not sufficient to establish negligence. In discussing the question of a slippery dance floor, the court in *Kalinowski v. Y.W.C.A.,* Wash. 135 P.2d 852, made the following statements:

> "Of course, there is the additional fact that respondent slipped, which of itself is not sufficient to establish negligence. Furthermore, the use of this mixture to make the floor smooth is not negligence *per se,* since it is customary to prepare a floor for dancing * * *
>
> "Respondent therefore knew, or as a reasonably prudent person should have known, that the substance used on the dance floor would not only make the dance floor slippery, but that some of it would adhere to the shoes and make them smooth and slippery, and would also be tracked out onto the linoleum by those going from the dance floor out to the lobby."

There is therefore no testimony in the record to establish that the condition described by appellee ren-

dered the dance floor slippery or dangerous. Cf. the testimony regarding "slipperiness" given in the recent decision of *Allen v. Matson Navigation Company,* 9 Cir., 255 F.2d 273. In pointing out that the mere fact there was a fall did not indicate why the fall occurred and further indicating the significance of the circumstances as indicating a *"slipping fall,"* this court stated:

> "Although the mere fact that Mrs. Allen fell would by itself be no evidence as to why she fell, yet the circumstances of how she fell, when considered with the other evidence in the case, has considerable significance. The witness who saw Mrs. Allen fall, as well as Mrs. Allen herself, testified that as Mrs. Allen walked across the landing, *both of her feet flew straight out in front of her and up into the air while she fell with a thud upon her back. That is at least some evidence that hers was a slipping fall.* This fact distinguishes this case from that of *Harpke v. Lankershim Estates,* 103 Cal. App.2d 143, 229 P.2d 103, upon which the trial court relied." (Emphasis supplied)

In the instant case, there was a very little slip (Tr. 45) which would indicate nothing as to whether the floor was *unreasonably slippery;* the same slip might as easily be explained by the fact that it occurred on a dance floor during appellee's dance. There was no other evidence to establish that this condition rendered the dance floor *unreasonably slippery.* The instant case is analogous to *Harpke v. Lankershim Estates,* Cal., 229 P.2d 103, upon which the trial court in the *Allen* case relied, and which is referred to by this court in the above quotation. The comment by this court in distinguishing the *Harpke* case is most appropriate and spells out the

situation which also exists in the instant case. In footnote No. 8 on page 280, this court stated as follows concerning the *Harpke* case:

> "That was a case where the plaintiff who fell down on the stairway of a building testified that she lost her balance and stumbled head first down the stairs. She did not know what caused her to stumble but she said the stairs were slippery. *The court held that no inference of negligence rises from the mere proof of a fall; that the burden rested upon the plaintiff to show the existence of a dangerous condition* and that the defendant knew or should have known of it; and that no inference of negligence arose merely from the proof that the floor was slippery in the absence of proof of some foreign substance on the floor was known to the owners. The court said (103 Cal. App.2d 143, 229 P.2d 105): '*The minimum duty of a plaintiff is to show that the stairway was in fact unsafe and that she fell because of that condition*'." (Emphasis supplied)

Furthermore, even assuming a slippery condition and a time period of 15 to 25 minutes, this evidence would still not support the finding that the shipowner should have discovered it and thereafter had a reasonable opportunity to correct it, in view of the small size—"five or six inches" (Tr. 28), its indefinite color (Tr. 49), and its location in the middle of the dance floor (Tr. 41) during the progress of the contest.

Finally, there is *no evidence* in the record that *appellee in fact slipped in the condition* described by him. Appellee testified only that he observed the substance "right next to my foot" (Tr. 28). There is no testimony

in the record to support the finding that he slipped as a proximate result of the condition or that he fell to the floor (Tr. 11, Finding II); said finding was clearly erroneous and should be reversed.

Statement by Cruise Director Inadmissible as Hearsay and Immaterial.

Statements by the Master of the vessel may bind the vessel owner. Statements made by others, including the Chief Mate, are inadmissible. *Naylor v. Isthmian S.S. Co.*, 2 Cir., 187 F.2d 538.

The statements made by the cruise director, in any event, are immaterial to the issues of negligence or proximate cause raised in this appeal. In *Campbell v. F. W. Woolworth and Company,* 8 Cir., 117 F.2d 152, the court considered statements made by the defendant's store manager after the plaintiff had slipped on a spot of tomato juice. She testified that: "He said something about it should have been cleaned up. There evidently was negligence on somebody's part that it wasn't cleaned up. That is all that he said." The plaintiff argued that the statement by the store manager indicated that he knew of the condition before the fall and that the trial court should have drawn that inference. The appellate court held that "such an inference would clearly have been unwarranted * * * " and refused to permit any such inference to be drawn from the statements.

In the same decision the court refers to the case of *Varner v. Kroger Grocery & Baking Co.,* Mo., 75 S.W. 2d 585, in which the defendant's manager had made the

statement after the plaintiff had slipped on a banana as follows: "We were so busy in the store we did not have time to clean it." It was argued that this statement was tantamount to an admission of actual knowledge of the presence of the banana on the floor, but the court held that that was a "strained and conjectural meaning" and did not warrant an implication of actual knowledge. Statements made after the accident which do not establish actual knowledge or constructive notice are disregarded. *Stowe v. S. H. Kresge & Co.,* 5 Cir., 164 F. 2d 593.

CONCLUSION

The findings of the District Court are clearly erroneous and based upon conjecture, speculation and the building or piling of inferences on inferences. The findings should be set aside and the cause remanded to the District Court with directions to enter judgment for the appellant.

Respectfully submitted,

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APPENDIX A — TABLE OF EXHIBITS

No.		*Description*	*Identified*	*Offered*	*Refused*
Defendant's	*A*	Deposition upon oral examination before trial of Louis Russak.	75-77	77	77